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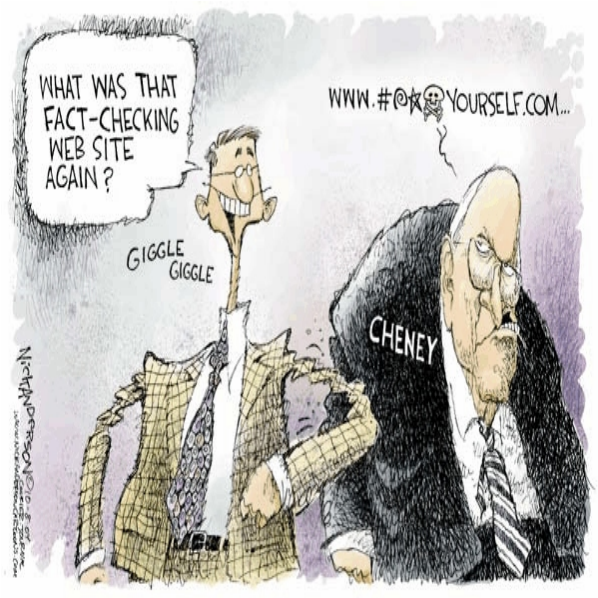


NEVADA CASES

http://www.leg.state.nv.us/scd/OpinionListPage.cfm

Desert Fireplaces Plus, Inc. v. Eighth Judicial Dist. Court, 120 Nev. Adv. Op. No. 70 (September 16, 2004). "In this original writ proceeding, we address two issues involving the two-year statute of limitations under NRS 78.585 for commencing a cause of action against a dissolved corporation for claims arising before the dissolution. First, we consider at what point a third party's claims against a dissolved corporation in a construction defect case arise for purposes of NRS 78.585. We conclude that the claim of a third-party litigant arises when the litigant discovers or should have discovered the defects.

Second, we address whether the two-year statute of limitations for commencing a cause of action against a dissolved corporation for claims arising before the corporation's dissolution is tolled under NRS 40.695 during mediation when the claims are for construction defects and the dissolved corporation is a third party that was not notified of the construction defect claims within two years after its dissolution. We conclude that a general notice of construction defect claims provided to a general contractor is sufficient to toll the statute of limitations for claims against a third-party subcontractor even when the subcontractor is not involved in the initial proceedings against the general contractor."

State v. Eighth Judicial Dist. Court, 120 Nev. Adv. Op. No. 69 (September 16, 2004). "Real party in interest Robert Romano is charged in an indictment with four counts of sexual assault of a minor under fourteen years of age and ten counts of lewdness with a child under fourteen years of age. The district court granted Romano's motion to compel the child victim to submit to an independent psychological examination. The State requests that this court issue a writ of prohibition, or in the alternative, mandamus, to prevent the Eighth Judicial District Court from enforcing its May 5, 2003, order granting Romano's motion for an

independent psychological examination of the victim.

We conclude that the district court abused its iscretion in ordering the child witness to submit to an independent psychological examination by the defendant's experts."

Nika v. State, 120 Nev. Adv. Op. No. 68 (September 16, 2004). "This is an appeal from a district court order denying a post-conviction petition for a writ of habeas corpus. Appellant Avram Nika was convicted of first-degree murder and sentenced to death.~ He contends that the district court erred in denying his petition because, among other reasons, a proceeding ordered by this court under former SCR 250 was an inadequate forum to determine whether he had received effective assistance from trial counsel. We conclude that this contention has merit. We also conclude that the district court's summary dismissal of most of Nika's claims was improper. We therefore reverse and remand in regard to those claims. We affirm the district court's denial, following an evidentiary hearing, of Nika's claim that the State's use of a jailhouse informant was unconstitutional.

Dettloff v. State, 120 Nev. Adv. Op. No. 67 (September 16, 2004). "Appellant Mitchell Dettloff appeals a judgment of conviction entered upon jury verdicts of guilty on three felony counts of leaving the scene of an accident. As a threshold matter, we have determined to reverse and vacate two of the three convictions under our recent decision in Firestone v. State, which prohibits multiple convictions in connection with leaving the scene of a single accident. We affirm the remaining conviction for the reasons set forth below.

In this appeal, we primarily consider the extent to which specific intent is a required element of the felony offense of leaving the scene of an accident. We also consider claims of alleged misconduct by the State before the grand jury, and claims concerning a defendant's prearrest silence, prearrest conduct and prearrest retention of counsel."

Beazer Homes Nevada, Inc. v. District Court, 120 Nev. Adv. Op. No. 66 (September 13, 2004). "This is an original proceeding brought by Beazer Homes Nevada, Inc., against various district court judges and real parties in interest William Robinson, The Highland Glen Homeowners Association, Coleen Fuller, Daniel Bolster and Sharon Bolster. Beazer contends that it dissolved as a corporate entity more than two years before the underlying construction defect complaints were filed and that the complaints are therefore barred under NRS 78.585. The Homeowners contend that the statute only bars actions that arise before the date of dissolution and are not commenced within the two-year statutory period. The Homeowners also contend that the word 'arise' is a term of art that applies when a claimant knows or should have known of a cause of action against the corporation and that their claims did not arise before Beazer's dissolution. We agree with the Homeowners' interpretation of the statute and accordingly deny the petition."

Scott v. Zhou, 120 Nev. Adv. Op. No. 65 (September 13, 2004). "On remand the district court again awarded Zhou attorney fees of $10,000, but this time indicated its reasoning. Scott appeals. We now affirm the district court's award of attorney fees."

Williams v. Williams, 120 Nev. Adv. Op. No. 64 (September 13, 2004). "This is a case of first impression involving the application of the putative spouse doctrine in an annulment proceeding. Under the doctrine, an individual whose marriage is void due to a prior legal impediment is treated as a spouse so long as the party seeking equitable relief participated

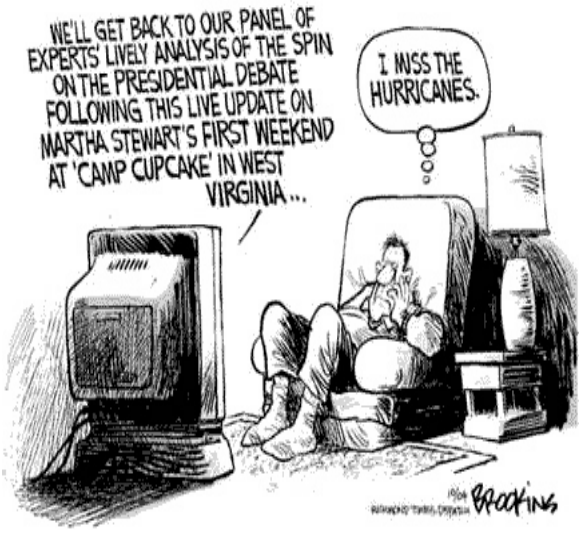
in the marriage ceremony with the good-faith belief that the ceremony was legally valid. A majority of states recognize the doctrine when dividing property acquired during the marriage, applying equitable principles, based on community property law, to the division. However, absent fraud, the doctrine does not apply to awards of spousal support. While some states have extended the doctrine to permit spousal support awards, they have done so under the authority of state statutes.

We agree with the majority view. Consequently, we adopt the putative spouse doctrine in annulment proceedings for purposes of property division and affirm the district court's division of the property. However, we reject the doctrine as a basis of awarding equitable spousal support. Because Nevada's annulment statutes do not provide for an award of support upon annulment, we reverse the district court's award of spousal support."

D.R. Horton, Inc. v. Green, 120 Nev. Adv. Op. No. 63 (September 13, 2004). "Appellant D.R. Horton, Inc., a real property developer, and respondents Michael Green, John Velickoff, and Tracy Velickoff entered into home purchase agreements containing a mandatory binding arbitration provision. In the ensuing dispute over the provision's validity, the district court found that the arbitration clause was adhesive and unconscionable. On appeal, Horton argues that the district court erred in concluding that the arbitration clause was unenforceable. We disagree. We conclude that the clause is void as unconscionable and affirm the district court's order denying Horton's motion to compel arbitration."

Bohlmann v. Printz, 120 Nev. Adv. Op. No. 62 (September 13, 2004). "In this appeal, we discuss the narrow circumstances under which an arbitration award may be vacated due to a manifest disregard of the law. Manifest disregard of the law is something beyond and different from a misinterpretation or error in applying the law. An arbitrator manifestly disregards the law when he or she recognizes that the law absolutely requires a given result and nonetheless refuses to apply the law correctly. Mere error in the application of the law is not grounds to vacate an arbitration award. We conclude that the arbitrator did not manifestly disregard the law in this case and affirm the district court."

Sullivan v. State, 120 Nev. Adv. Op. No. 61 (September 3, 2004). "In this appeal, we consider whether the district court's entry of an amended judgment of conviction provided good cause to extend the one-year limitation set forth in NRS 34.726(1) for filing a timely post-conviction petition for a writ of habeas corpus. We conclude that because the claims presented in appellant's post-conviction petition were unrelated to the district court's clerical amendment, the entry of the amended judgment in this case did not provide good cause to excuse appellant's failure to raise the claims asserted in his petition within the statutory deadline."



NINTH CIRCUIT CASES

(Ninth Circuit cases can be found at http://www.ca9.uscourts.gov/ca9/neopinions.nsf)

United States v. Atondo-Santos, No. 04-10095 (October 6, 2004). "At its third and most recent sentencing hearing, the districtcourt sentenced Atondo-Santos to 66 months in prison once again. The government has filed a third appeal. We reverse, and exercise our supervisory power under 28 U.S.C. § 2106 to reassign this case to a different district court judge for resentencing."

Carter v. Giurbino, No. 02-56538 (October 5, 2004). "The California Supreme Court issued a postcard denial of appellant Jerry Carter's petition for writ of habeas corpus, citing only In re Lindley, 177 P.2d 918 (1947). Lindley stands for the California rule that a claim of insufficiency of evidence can only be considered on direct appeal, not in habeas proceedings. In denying a federal petition for writ of habeas corpus, the district court held that the Lindley rule is an independent and adequate state procedural bar and that appellant had procedurally defaulted his sufficiency of evidence claims by failing to pursue them to conclusion on direct appeal. We agree and affirm."

Swift v. Christian, No. 02-57136 (October 5, 2004). "Michael Swift appeals the district court's dismissal of his 42 U.S.C. § 1983 action against two California parole officers. Swift alleges that his Fourth Amendment rights were violated as a result of: (1) the officers' investigation of suspected parole violations; (2) the officers ordering Swift's arrest pursuant to a parole hold; and (3) their recommendation for the initiation of parole revocation proceedings. The districtcourt found the officers entitled to absolute immunity under Sellars v. Procunier, 641 F.2d 1295 (9th Cir. 1981), and Anderson v. Boyd, 714 F.2d 906 (9th Cir. 1983). We have jurisdiction pursuant to 28 U.S.C. § 1291 and conclude that the officers' right to immunity is not controlled by these cases. Applying the functional approach to absolute immunity in accordance with Antoine v. Byers & Anderson, Inc., 508 U.S. 429 (1993), and Miller v. Gammie, 335 F.3d 889 (9th Cir. 2003) (en banc), we hold that parole officers are not absolutely immune from suits arising from conduct distinct from the decision to grant, deny, or revoke parole. Accordingly, we reverse."

National Wildlife Federation v. United States Army Corp of Engineers, No. 03-35235 (October 4, 2004). "We must decide whether the United States Army Corps of Engineers (Corps) has met its obligation to comply with state water quality standards, as required by the Clean Water Act. The lawsuit claimed that the Corps had violated the APA because the 2001 ROD did not address properly the Corps's obligations to comply with the State of Washington's water quality standards for temperature, as required by the Clean Water Act's incorporation of state water quality law. The district court concluded that the 2001 ROD was not arbitrary and capricious or contrary to law, and granted summary judgment to the Corps. We have jurisdiction on appeal under 28 U.S.C. § 1291, and affirm."

Gibson v.Ortiz, No. 03-56518 (October 4, 2004). "Warden George Ortiz appeals the district court's grant of the writ of habeas corpus to petitioner James Naff Gibson. The district court found that the use of California Jury Instruction, Criminal No. 2.50.01, which pertains to evidence of prior sexual offenses, allowed the jury to find Gibson guilty of the charged offenses by relying on facts found only by a preponderance of the evidence.

This lessened burden of proof violated Gibson's due process rights under In re Winship, 397 U.S. 358 (1970), which requires the prosecution to prove every element charged in a criminal offense beyond a reasonable doubt. Thus, the constitutionally infirm instruction deprived Gibson of a "jury verdict within themeaning of the Sixth Amendment." Sullivan v. Louisiana, 508 U.S. 275, 280 (1993). Because the California Court of Appeal's verdict was contrary to Winship and Sullivan, we affirm."

R. J. Reynolds Tobacco Co. v. Shewry, No. 03-16535 (September 28, 2004). "We deal here with a novel First Amendment claim. The appellants, three tobacco companies, claim that California violated their First Amendment rights by imposing a surtax on cigarettes and then using some of the proceeds of that surtax to pay for advertisements that criticize the tobacco industry. The tobacco companies argue that this is a case of compelled subsidization of speech prohibited by the First Amendment, analogous to United States v. United Foods, Inc., 533 U.S.405 (2001). California counters that the advertisements are government speech entirely immune from First Amendment attack. The tobacco companies concede that (1) the imposition of the tax itself is not unconstitutional and (2) the message produced by the government's advertisements creates no First Amendment problem apart from its method of funding. Rather, they argue for an independent First Amendment violation based on the close nexus between the government advertising and the excise tax that funds it. We reject this argument as unsupported by the Constitution and Supreme Court precedent, and as so unlimited in principle as to threaten a wide range of legitimate government activity. We also reject the tobacco companies' claim that the advertisements violated their rights under the Seventh Amendment or the Due Process Clause. We thus affirm the district court."

Hunt v. Pliler, No. 01-56963 (September 28, 2004). "This is an appeal from the dismissal with prejudice of Joseph Hunt's habeas corpus petition. We have jurisdiction under 28 U.S.C. §§ 1291 and 2253. The case is now before us on remand from the Supreme Court, which vacated our prior decision and remanded for further consideration 'in light of Pliler v. Ford, 542 U.S. __ 159 L. Ed. 2d 338, 124 S. Ct. 2441 (2004).' Pliler v. Hunt, 542 U.S. ___, 159 L. Ed. 2d ___, 124 S. Ct. 2903 (2004). In Ford, the Court held that a district court is not required to warn a pro se litigant that it could not con-ider a motion to stay a mixed petition unless he amends the petition and dismisses unexhausted claims and that his claims would be time barred under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254(d), upon his return to federal court if he dismissed his petition to return to state court to exhaust his claims. Ford, 124 S. Ct. at 2445. In our prior decision we vacated the district court's order dismissing Hunt's petition on three grounds: (1) the court's failure to comply with the procedure governing designation of magistrate judges, (2) the court's abuse of its discretion in dismissing the petition with prejudice, and (3) the court's failure to advise Hunt of the option of staying his exhausted claims pending exhaustion of his unexhausted claims. Hunt v. Pliler, 336 F.3d 839, 846-47 (9th Cir. 2003). Upon further consideration, we adhere to our decision on the first two grounds and reject the third. Thus, we vacate the district court's decision and remand."

Genzler v. Longanbach, No. 02-56572 (September 27, 2004). "Plaintiff David Genzler seeks damages under 42 U.S.C. § 1983 for violations of his constitutional rights during the investigation and prosecution of his state criminal homicide trial. Defendants San Diego County Deputy District Attorney

Peter Longanbach and Investigator Jeffrey O'Brien appeal from the partial denial of their motions for summary judgment based on absolute official immunity. Defendant supervisors in the San Diego County District Attorney's Office — District Attorney Paul Pfingst, Assistant District Attorney Gregory Thompson, and Deputy District Attorney James Pippen — appeal the district court's complete denial of their motion for summary judgment based on absolute and qualified immunity. We affirm the district court's partial denial of Longanbach's and O'Brien's motions. Evaluating the timing and nature of their conduct, we conclude that there is a genuine issue of material fact about whether they were engaged in advocacy intimately associated with the judicial process when they interviewed a key witness, Sky Blue Flanders. However, we reverse the district court's denial of the supervisors' motion for summary judgment because we conclude that there is no genuine dispute that their involvement in prosecutorial decisions was advocacy intimately associated with the judicial process."

Dream Palace v. County of Maricopa, No. 00-16531 (September 27, 2004). "We must decide whether a local ordinance imposing certain licensing requirements and operating restrictions on adult entertainment establishments violates the First Amendment."

KRL v. Moore, No. 02-15296 (Setember 27, 2004). "We have jurisdiction to consider whether absolute or qualified immunity shields Riebe, Irey, and Hall from liability for their involvement with the January search warrants. The issues of fact identified by the district court do not thwart our review of whether Hall is entitled to qualified immunity for his reliance on, and execution of, the second search warrant. See Saucier v. Katz, 533 U.S. 194, 202 (2001). If as alleged, Hall was the "lead officer" and seized documents predating 1990, we have jurisdiction to decide whether that conduct vio-lated a constitutional right and, if so, whether Hall acted reasonably. We reverse the denial of absolute immunity to the extent that defendants used the second search warrant to gather evidence to prosecute the indictment. We reverse the denial of qualified immunity to Riebe for his role in approving the sec-ond search warrant to investigate additional crimes. We affirm the denial of qualified immunity to Hall on Plaintiffs' claims that Hall unreasonably relied on and executed the second search warrant. Finally, we affirm the denial of absolute immunity to defendants for their roles in the third search warrant, but reverse the denial of qualified immunity to Riebe and Hall on the claim of judicial deception. We remand to the very capable district judge for further proceedings. Because Irey did not contest the denial of qualified immunity, we also remand to the district court those claims against Irey to which absolute immunity does not apply."

Stevenson v. Lewis, No. 03-55784 (September 22, 2004). "Habeas petitioner Amos Dwayne Stevenson claims that he was tried in Orange County for a crime he committed in Los Angeles County in violation of the vicinage clause of the Sixth Amendment. The United States Supreme Court has yet to decide whether the vicinage clause applies to the states through the Fourteenth Amendment. Consequently, the California Court of Appeal's decision that petitioner was properly tried in Orange County is not contrary to, or an unreasonable application of, clearly established federal law as determined by the Supreme Court. Accordingly, we affirm on this ground the district court's denial of Stevenson's habeas petition."

United States v. Camper, No. 03-50442 (September 22, 2004). "Defendant Demond

Jamal Camper appeals from his conviction of making a false statement to the government, 18 U.S.C. § 1001 (2000), when he filled out a criminal history questionnaire as part of an airport security badge application. He argues that there was insufficient evidence that his answer was false. We affirm."

United States v. Cortez-Rocha, No. 03-50491 (September 21, 2004). "Julio Cortez-Rocha appeals from his conviction following a conditional guilty plea for importation of marijuana in viola-ion of 21 U.S.C. §§ 952 and 960. He asserts that the district court should have suppressed the marijuana discovered during a border search of his vehicle because the invasive search of his vehicle's spare tire was obtained pursuant to an invalid border search. We hold that the border search of Cortez-Rocha's tire did not require reasonable suspicion, and we affirm."

Motley v. Parks, No. 02-56648 (September 21, 2004). "Darla Motley brings this 42 U.S.C. § 1983 action on behalf of herself and her infant son Juan Jamerson, claiming that the defendants unlawfully searched her home and used excessive force against her infant son. The defendants-appellees are Albert Ruegg, Gregory Kading, Daryl Gates, and Bernard Parks of the Los Angeles Police Department (LAPD); Guadalupe Sanchez, a California Parole Officer; and James Black and Larry Webster, who are federal Bureau of Alcohol, Tobacco, and Firearms (ATF) agents (collectively, "the officers"). The officers claim qualified immunity for their actions, and Motley appeals from two district court orders granting summary judgment on that basis. We reverse the district court's grant of qualified immunity to Ruegg, Sanchez, Kading, and Black on the search and excessive force claims. We affirm the grant of summary judgment to Webster, Gates, and Parks. United States v. Buenos-Vargas, No. 03-50381 (September 21, 2004).

Does a customs agent's statement of probable cause to detain an arrested person pending further proceedings, made under penalty of perjury and sent to a magistrate judge by facsimile (fax), satisfy the Fourth Amendment's requirement of an 'Oath or affirmation'? We answer that question 'yes' and, accordingly, affirm."

United States v. Montgomery, No. 03-30269 (September 15, 2004). Defendants James Montgomery and Mary Lou O'Connor were convicted by a jury of conspiring to commit mail fraud and committing mail fraud in violation of 18 U.S.C. §§ 371 and 1341. Montgomery challenges the district court's denial of his claim that the marital privilege excludes evidence of his wife's communications to him. Both defendants also challenge the indictment, the sufficiency of the evidence, the district court's admission of a summary exhibit and their sentences. Montgomery's convictions are REVERSED, and his case is REMANDED for a new trial. O'Connor's convictions are AFFIRMED, but the restitution order and her sentence are VACATED and REMANDED."

Isley v. Arizona Dep't of Corrections, No. 03-15858 (September 15, 2004). "Arizona state prisoner Bradford K. Isley appeals the district court's dismissal as untimely of his 28 U.S.C. § 2244 petition for writ of habeas corpus. Under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), state prisoners must file any petition for federal post-conviction relief within one year of the date that the state court judgment against them became final. 28 U.S.C. § 2244(d)(1)(A). The AEDPA one year limitation period is tolled so long as 'a properly filed application for State post-conviction or other collateral review' is 'pending.' 28 U.S.C. § 2244(d)(2). Isley's actual petition was not filed for more than a

year after his conviction became final, but there is a dispute about how long his application for state court relief was 'pending.'

We follow the logic of our sister circuits. Because he properly followed Arizona procedures for commencement of a post-conviction proceeding and placed a request for relief before the appropriate state court by filing the required Notice, we hold that Isley's state petition was 'pending' within the meaning of 28 U.S.C. § 2244(d)(2) and he was entitled to tolling from the date when the Notice was filed. The district court erred in dismissing his petition as untimely."

United States v. Rojas-Flores, No. 03-50252No. 03-50252 (September 13, 2004). "Rogelio Rojas-Flores is an inmate at the federal penitentiary in Lompoc, California. Following a routine cell search, a correctional officer found sharpened steel objects concealed at Rojas' waist. Rojas was convicted under 18 U.S.C. § 1791 for possession of contraband in prison and received a 51-month sentence, to be served consecutively to the sentence he was already serving for a violation of 8 U.S.C. § 1326, unlawful reentry. Rojas appeals his conviction and his sentence. We have jurisdiction pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291, and we affirm the conviction, but vacate the sentence and remand for resentencing."

United States v. Hugs, No. 02-30390 (September 13, 2004). Harvey Hugs appeals from the judgment entered following his conviction by a jury of involuntary manslaughter in violation of 18 U.S.C. §§ 1153 and 1112. Mr. Hugs was charged with and found guilty of involuntarily killing Theron Old Elk on April 10, 2001. Mr. Hugs contends that the court's instructions to the jury altered the charges brought against him by the grand jury and thus violated his Fifth Amendment rights. He also contends that a condition of his supervised release, which requires that he provide the Government a DNA sample, is unconstitutionally vague and improper. We affirm

Mr. Hugs's conviction because we conclude that the erroneous jury instructions did not affect Mr. Hugs's substantial rights under the plain error rule. We also affirm the special condition of Mr. Hugs's supervised release because we conclude that requiring Mr. Hugs to provide a DNA sample is a minimal intrusion into his right to privacy."

Phiffer v. Columbia River Correctional Facility, No. 01-35984 (September 13, 2004). "On April 21, 2003, we filed a memorandum in this case. 63 Fed. Appx. 335 (9th Cir. 2003). The Supreme Court granted certiorari, 124 S. Ct. 2386 (2004), and vacated and remanded for further consideration in light of Tennessee v. Lane, 124 S. Ct. 1978 (2004). Upon due consideration, we conclude that our initial resolution of this case is consistent with Lane's holding, and we reissue our original disposition in per curiam form without further amendment.

Our precedent clearly commands the conclusion that the State is not entitled to Eleventh Amendment immunity under Title II of the ADA. Likewise, our precedent is clear that the State waived its Eleventh Amendment immunity under Section 504 of the Rehabilitation Act by accepting federal funds.

Porter v. California Dep't of Corrections, No. 02-16537 (September 10, 2004). "On appeal, Porter makes two primary arguments. First, she argues that the district court erred in holding as a matter of law that she could not prove her retaliation claim because too much time elapsed between her reports of harassment and the CDC's retaliatory acts. Second, she asserts that the district court erred in holding as a matter of law that her sexual harassment claim was barred because

'the many hostile acts directed against her within the limitations period bore no relation to the pervasively hostile working environment on which she based her claim.' We agree with Porter and reverse the district court. We hold that, although Porter's claims for harassment in 1995 and 1996 are time-barred, Porter is not precluded from attempting to show a causal link between the earlier harassment and more recent alleged acts of discrimination or retaliation."

United States v. Kaur, No. 03-30306 (September 10, 2004). "Manjit Kaur was convicted of possessing and distributing pseudoephedrine knowing or having 'reasonable cause to believe' that it would be used to manufacture methamphetamine in violation of 21 U.S.C. § 841(c)(2).1 On appeal, Ms. Kaur challenges the district court's jury instruction explaining the meaning of the reasonable cause to believe mental state found in that statute ("Instruction 17"). This circuit has not previously interpreted that statutory mens rea requirement. We hold that the district court did not abuse its discretion in formulating Instruction 17, which fairly and accurately described the required mental state."

Public Utility Dist. No. 1 v. Dynegy Power Marketing, Inc., No. 03-55191 (September 10, 2004). "Snohomish charges that the defendants manipulated the market and restricted electricity supplies in order to cause artificially high prices in the market from which Snohomish purchased power. Snohomish seeks treble damages and injunctive relief.

The district court held that the claims were preempted by federal law, which authorizes the Federal Energy Regulatory Commission to set wholesale electricity rates. Snohomish appeals, contending that FERC's policy of setting rates in accordance with market forces amounts to an abdication of rate making. Because FERC has exclusive jurisdiction over interstate sales of wholesale electricity, and continues to engage in regulatory activity, we affirm."

Jones v. City of Santa Monica, No. 03-55211 (September 10, 2004). "This appeal in a civil rights action brought pursuant to 42 U.S.C. § 1983 requires us to determine the constitutionality of the City of Santa Monica's procedure for determining probable cause after a warrantless arrest. Petitioner Carolyn Jones asserts that the City's procedure violates the Fourth and Fourteenth Amendments because it does not provide an arrestee with an opportunity for personal appearance before the magistrate at the time the probable cause determination is made and because the application for probable cause submitted to the magistrate is made on a pre-printed form. We conclude that the City's procedure does not violate the Constitution."

Ferrieria v. Ashcroft, No. 02-16945 (September 9, 2004). "Manuel Oliveira is a permanent resident alien who was ordered removed to Portugal after his 1998 conviction in California state court for possession of methamphetamine. In a petition for a writ of habeas corpus, he argued that the Immigration Judge and the Board of Immigration Appeals erred in concluding that he was an aggravated felon, because his conviction was a 'wobbler' offense that the state court had sentenced as a misdemeanor. The district court denied his petition, ruling that Oliveira's conviction constituted an aggravated felony because it was a controlled substance offense that was punishable by more than one year's imprisonment under state law. We reverse. Oliveira's offense of conviction is not an aggravated felony because it would not be punishable as a felony under federal drug laws and does not contain a trafficking element."

United States v. Staves, No. 03-50300

(September 9, 2004). "Defendants-Appellants Frederick James Staves and Ernest Wayne, who conditionally pled guilty to federal drug trafficking offenses, appeal the denial of their motions to suppress evidence obtained through wiretapping. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

The wiretap application contains a full and complete statement of the facts supporting the wiretap application, and the issuing judge did not abuse her discretion in concluding that a wiretap order was necessary to uncover the full scope of the drug trafficking conspiracy. The district court properly denied Franks hearings on the motions to suppress. Accordingly, the district court's denial of Staves's and Wayne's motions to suppress wiretap evidence is AFFIRMED."

Headwaters, Inc. v. United States Forest Serv., No. 01-35898 (September 8, 2004). "This case presents a problem peculiar to public law cases. The plaintiffs in this case are suing to vindicate a public right that has already been litigated by other environmental groups. The plaintiffs contest the validity of sales of timber made by the Forest Service. Those particular sales, however, have already been challenged by other environmental groups using the same arguments that the plaintiffs now present. We agree with the district court that the current plaintiff's interests were virtually represented by the previous groups, so we affirm the district court's dismissal of the case on res judicata grounds."

Smith v. Idaho, No. 02-36043 (September 7, 2004). "Ramon Smith appeals the district court's dismissal of his petition for a writ of habeas corpus. The district court held that Smith's claims were procedurally barred because Smith had failed to comply with state procedural rules during his state post-conviction proceedings. The district court also held that Smith had made no showing of cause and prejudice to excuse his procedural default. Smith filed a timely appeal. We conclude that the district court lacked personal jurisdiction over the petition, but that the State of Idaho has waived any jurisdictional defects. On the merits, we conclude that Smith has not shown cause to excuse his procedural default. We therefore affirm the district court."

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http://www.lexisnexis.com/applieddiscovery/lawLibrary/newsletter.asp

Metadata 101: What Lies Beneath
Nadine C. Warner
http://www.abanet.org/govpub/sum02toc.html

In 2000, a Democratic candidate running for a U.S. Senate seat in Minnesota received emails with Microsoft Word attachments criticizing his campaign. Metadata revealed that the author was the Republican incumbent's chief-of-staff. - McCarthy, Michael J. "Electronic Form of 'Invisible Ink': Inside Files May Reveal Secrets." Wall Street Journal, 20 October 2000. In 2004, the SCO Group filed lawsuits against DaimlerChrysler and AutoZone. Metadata revealed that the software provider initially planned to sue Bank of America as well, but SCO changed its mind and "removed" the bank's name from the pleading. - Shankland, Stephen and Scott Ard. "Hidden Text Shows SCO Prepped Lawsuit against BofA." CNET News, 4 March 2004. A software consulting company receives a contract originally created for another technology firm. It prompts the software company to create software to remove metadata. - Payne,

Donna. “Metadata: The Good, the Bad, and the Ugly.” Law Office Computing, February/March 2004. Stories like these have been in the news over the last few years. It seems that every lawyer has a colleague who has either heard about or experienced firsthand the perils of “metadata,” i.e., not-readily-visible information about an electronically transmitted document. Because of the potential that confidential data hidden within documents may be revealed, attorneys have an obligation to educate themselves about metadata and the tools available to remove such data from their documents.

What is Metadata?

Metadata is “data about data.” In word processing programs such as Microsoft Word and Corel WordPerfect, a document contains both visible and invisible information. Most users assume that the words that appear on the screen as they type comprise the complete record of the document. However, this is not true. When a user changes a particular phrase, deletes a passage, or searches and replaces one phrase for another, the document records these alterations and stores the original text. Many people do not realize that information about the alteration and the original text, although not visible on the screen, can in some cases be easily recovered. As a result, without a standard policy or procedure regarding metadata, attorneys can make the mistake of sharing this invisible—and often confidential—information when they transmit the document electronically. Metadata elements include the following: . . .

Metadata in Microsoft Word

Microsoft Word includes tools that assist a user when collaborating with another user on the same document. . . .

Metadata in Corel WordPerfect

Like Microsoft Word, Corel WordPerfect documents also contain metadata that can be uncovered with a few clicks on the keyboard. WordPerfect documents can be “reverse edited” by utilizing the Undo command. . . .

The PDF Solution?

One common recommendation for avoiding the metadata issue in word processing documents is to convert the document to a portable document format (PDF) because PDF files do not contain as much metadata as Microsoft Word documents. . . .

Cleaning Documents Internally

While metadata is very easy to create, it often proves more challenging to remove. Microsoft Word 2002 included some added features to help minimize the accidental electronic transmission of metadata. . . .

Third-Party Solutions

The commercial solutions available are similar to the Microsoft options, and they include a function that will prompt users to clean their documents before transmitting them by e-mail. Some of the companies that offer these products are listed in alphabetical order below: . . .

Ethical Implications

At least one bar association has expressed the view that it is unethical for attorneys to actively seek out metadata in documents that they receive. . . .

Looking Ahead

Metadata is a helpful tool when it is used responsibly and consciously. However, as efiling and e-mailing become the norm, lawyers must be vigilant to avoid allowing confidential information to be transmitted

through metadata. Knowledge of metadata issues and the relevant tools to combat them will help lawyers avoid the metadata trap.

OTHER CASES

JACQUES v. DIMARZIO, INC. No. 03-9080 (2ND Cir. October 5, 2004). In an employment discrimination case under the Americans with Disabilities Act (ADA), the district court committed reversible error when it instructed the jury that an impairment causing a demeanor of hostility and social withdrawal qualified under the ADA as a disability.
http://caselaw.lp.findlaw.com/data2/circs/2nd/039080p.pdf

BOURDON v. LOUGHREN, No. 03-0196 (2nd Cir. October 5, 2004). The appointment of counsel is a valid means of fully satisfying a state's constitutional obligation to provide prisoners, including pretrial detainees, with access to the courts in conformity with the requirements of the Due Process and Equal Protection clauses.
http://caselaw.lp.findlaw.com/data2/circs/2nd/030196p.pdf

MODROVICH v. ALLEGHENY COUNTY, No. 03-3571 (3rd Cir. Ocober 6, 2004). The display of a plaque containing the text of the Ten Commandments on the Allegheny County Courthouse does not constitute an endorsement of religion in violation of the Establishment Clause of the First Amendment of the U.S. Constitution.
http://caselaw.lp.findlaw.com/data2/circs/3rd/033571p.pdf

KLINE v. SECURITY GUARDS, INC., No. 03-3404 (3rd Cir. October 6, 2004). In a suit alleging illegal surveillance in plaintiff's workplace, judgment entered in favor of defendants is reversed where the district court did not have subject matter jurisdiction over any of the state law claims asserted in the complaint.
http://caselaw.lp.findlaw.com/data2/circs/3rd/033404p.pdf

ALLEN v. THOMAS, No. 03-21208 (5th Cir. October 7, 2004).Dismissal of plaintiff-prisoner's claim that his constitutional rights were violated during the confiscation of his belongings is reversed where defendants may be liable since the confiscation was done under the authority of prison administrative directive.
http://caselaw.lp.findlaw.com/data2/circs/5th/0321208p.pdf

ANDERER v. JONES, No. 02-3669 (7th Cir. October 6, 2004). Plaintiff-police officer's suit, alleging Fourth and First Amendment violations associated with the termination of his employment, is dismissed where defendant had probable cause to arrest him and the speech issue concerned a private personal dispute that was not a matter of public concern.
http://caselaw.lp.findlaw.com/data2/circs/7th/023669p.pdf

Today's Word:
Oscitancy (Noun)

Pronunciation: ['ah-si-tên-si] Listen

Definition: (1) Yawning or a yawn, hence (2) the drowsiness or dullness associated with yawning.

Usage: Today's word is rare but unvexed. It is the noun from the adjective oscitant "drowsy, yawning."